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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-5506

CURTIS BRINTLEY,

Appellant,

-vs-

STATE OF MICHIGAN,

Appellee.

ORIGINAL COPY

IN THE MATTER OF PEOPLE OF THE STATE OF MICHIGAN v ANNETTE GAIL ALEXANDER, Appellant, (In re Wayne County Prosecutor v Recorder's Court Judge)

Petitioner's Reply Brief

BRIEF IN OPPOSITION TO MOTION TO DISMISS (re ALEXANDER)

WHERE AN APPEAL ARISES FROM A PROCEEDING DISTINCT FROM APPELLANT'S TRIAL LITIGATION, WHICH PROCEEDING CHALLENGED THE TRIAL COURT'S AUTHORIZATION TO REFUSE TO SENTENCE APPELLANT, ESTABLISHED THE RECORD OF THE CONSTITUTIONAL ISSUE RAISED IN THIS APPEAL, AND HAS BEEN TERMINATED IN THE STATE COURT, WHERE THE ISSUES LITIGATED IN THE PROCEEDING WERE NARROWER THAN THOSE RAISED AT TRIAL, AND WHERE BOTH THE PLAINTIFF AND NAMED DEFENDANT IN THE PROCEEDING ARE OTHER THAN THE NAMED PARTIES TO THE TRIAL COURT ACTION, IS NOT THE FINAL JUDGMENT OF THE HIGHEST STATE COURT AS TO THIS PROCEEDING REVIEWABLE BY THIS COURT?

STATEMENT OF FACTS

The facts underlying this appeal are set out in Appellant's Jurisdictional Statement.

After the trial judge merged Appellant's sentence as

to Count II (possession of a firearm during the commission of a felony) with her sentence as to Count I (second degree murder), the Wayne County Prosecutor initiated an original action in the Michigan Court of Appeals, naming the trial judge as defendant and challenging his authorization to refuse separately to sentence on Count II. [Appellant had the status of a party to this action in that court and in the Supreme Court of Michigan as well.] The sole issue considered by that court was the constitutionality of MCLA 750.227b (possession of a firearm during the commission of a felony) as relevant to the trial judge's authority to act as he did. No other question was considered in that court or in the Supreme Court of Michigan in this proceeding. The judgment of the latter court is not reviewable by any other Michigan state court, nor may Appellant raise the issue litigated in this proceeding in her pending state court appeal of her convictions.

The separate proceeding initiated by the Wayne County Prosecutor established virtually the entire record of the constitutional issue presented in this appeal.

ARGUMENT

As part of this Court's jurisdiction to review the final judgments of the highest court of a state in which a decision can be had, 28 USC §1257, it has determined that the test for finality "is not whether under local rules of practice the judgment is denominated final...but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." Department of Banking v Pink, 317 US 264, 268 (1942).

Where an appeal in this Court is in some way related to other pending litigation, a critical factor in determining the finality of the judgment below is whether the proceeding in this Court is, in fact, distinct from the other pending proceeding.

In Costarelli v Massachusetts, 421 US 193 (1975), where appellant had been convicted in the first tier of Massachusetts' two-tier system, this Court discussed certian criteria for determination of whether a proceeding is distinct for review purposes. After lodging an appeal to the second tier, Costarelli appealed to this Court, challenging the non-jury nature of the first proceeding. Dismissing his appeal for want of jurisdiction, this Court noted several respects in which distinctness was there lacking: The proceeding in the second tier would be based on precisely the same complaint brought in the first trial; it would involve broad de novo litigation of all aspects of the case; and it would not be a distinct lawsuit.

In Fisher v District Court, 424 US 382 (1976), involving a Montana writ of supervisory control comparable to the Michigan order of superintending control involved herein, this Court rejected a claim virtually identical with Appellee's here:

> The writ of supervisory control issued by the Montana Supreme Court is a final judgment within our jurisdiction under 28 USC §1257(3). It is available only in original proceedings in the Montana Supreme Court, Mont Const, Art VII, §§2(1), (2); Mont Rule App Civ Proc 17(a), and although it may issue in a broad range of circumstances, it is not equivalent to an appeal. See Mont Rule App Civ Proc 17(a); State ex rel. Amsterdam Lumber, Inc v District Court, 163 Mont 182, 186-187, 516 P2d 378, 380-381 (1973); Walker v Tschache, 162 Mont 213, 215-217, 510 P2d 9, 10-13 (1973). A judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, even if further proceedings are to be had in the lower court. 424 US at 385, n7 (emphasis added)

See also Rescue Army v Municipal Court, 331 US 549, 565-568 (1947); New York ex rel Bryant v Zimmerman, 278 US 63, 70 (1928); Largent v Texas, 318 US 421, 422 (1943); Bandini Petroleum Co v Superior Court, 284 US 4 (1931). Contrast: Gospel Army v City of Los Angeles, 331 US 543 (1947).

As in Fisher, and as distinguished from Costarelli, the instant appeal arises from an action independent from the remaining proceedings below. The complaint for superintending control filed by the Wayne County Prosecutor in the Michigan Court of Appeals was an original proceeding, defined by Michigan General Court Rules [hereinafter GCR] 711.1 at p. 157 (West 1978), as "enforc[ing] the superintending control power of a court over lower courts or tribunals.* It is not a substitute for an appeal.

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* GCR 711 provides:

> .1 Scope. A superintending control order enforces the superintending control power of a court over lower courts or tribunals.
>
> .2 Policy Concerning Use. If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed. See GCR 1963, 701.1(b); 711.4(b); 862.5(a).
>
> .3 Writs Superseded. A superintending control order replaces the writs of certiorari and prohibition and the writ of mandamus when directed to a lower court or tribunal.
>
> .4 Jurisdiction.
>
> (a) The Supreme Court, the Court of Appeals, and the circuit court have jurisdiction to issue superintending control orders to lower courts and tribunals.
>
> (b) When an appeal in the Supreme Court, the Court of Appeals, or the circuit court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.
>
> .5 Procedure for Superintending Control in Circuit Court.
>
> (a) Complaint. A party seeking superintending control in the circuit court must file a complaint with the court. Only the plaintiff's name may appear in the case title (for example, In re Smith). The plaintiff must serve a copy of the complaint on the court or tribunal over which superintending control is sought and any other party to the proceeding in that court.
>
> (b) Answer. Anyone required to be served under paragraph (a) may file an answer within 20 days after the complaint is served.

(continued on next page)

In his complaint, the prosecutor alleged that the trial judge was without legal authorization to refuse to sentence Appellant for violation of MCLA 750.227b. The named parties to this proceeding (Wayne County Prosecutor v Recorder's Court Judge) are not the parties (People of the State of Michigan v Annette Gail Alexander) to the other proceeding below. The superintending control action was narrowly confined to considering the constitutionality of MCLA 750.227b and was not a broad relitigation of all or any other aspects of the trial court proceeding. It has also precluded Ms. Alexander from litigating this issue anew in state court. Finally, this action and its subsequent appeal to the state supreme court established virtually the only record by which this Court can consider the constitutional question raised in this appeal.

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> (c) Issuance of Order; Dismissal.
>
> (1) After the filing of a complaint and answer or, if no answer is filed, after expiration of the time for filing an answer, a circuit judge may issue an order to show cause why the order requested should not be issued, may issue the order requested, or may dismiss the complaint.
>
> (2) If a need for immediate action is shown, a judge may enter an order before an answer is filed.
>
> (3) The court may require in the order to show cause that additional records and papers be filed.
>
> (4) An order to show cause must specify a date for hearing the complaint.

For all these reasons, the judgment below is presently reviewable by this Court. The motion to dismiss should, therefore, be denied.

Respectfully submitted,

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Dated: November 1, 1979